

NO. 227642
COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

CASHMERE VALLEY BANK, a Washington corporation,

Respondent

v.

TERRY B. BRENDER, a single man,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY NO. 03-2-00268-7

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

Terry Brender submits this Reply Brief of Appellant in response to Cashmere Valley Bank's Brief of Respondent.

Cashmere Valley Bank ignores the facts and the law.

The only reason that Terry Brender wanted to borrow money from Cashmere Valley Bank in 1993 was so that he could settle his divorce.

Cashmere Valley Bank cannot dispute the testimony of its own loan officer, Jim Geary. Mr. Geary, when deposed, stated the following:

Q Okay. You made a loan to Mr. Brender in 1993; is that correct?

A Yes.

Q Okay. Do you recall when you started talking to Mr. Brender about this loan?

A Not exactly, but I would speculate - - very early in 1993.

Q Okay. And what were the reasons that Mr. Brender came to see you about this loan?

A He was about to settle a divorce.

(CP 396)

Cashmere Valley Bank cannot dispute its own internal memorandum dated 02/09/93.

Terry has been a well regarded borrowing customer of the bank for about 30 years. For the past year and a half he has been in the middle of a complicated and costly divorce proceeding. These new funds being requested would finally settle the divorce and allow him to retain full ownership of his orchard and mill which provide his livelihood. This past year and a half has been an unproductive and costly time for Terry as he has been defending himself in the divorce proceeding, which has distracted him from his main activity of cutting and selling shakes. Also during this time he has been forced to pay out considerable sums to both attorneys. These new funds and the restructuring of our present debt would put the bank in a fully secured and amortizing position. (Emphasis added.)

(CP 65)

Cashmere Valley Bank cannot dispute the testimony of Terry

Brender. Mr. Brender has stated the following:

The purpose of the loan was to pay a divorce settlement to my ex-wife. Jim Geary knew the only purpose I needed the loan funds was to pay the divorce settlement to my ex-wife. I had no other reason to obtain a loan from Cashmere Valley Bank. Had I not required loan funds to settle my divorce, I would never

had made this loan with Cashmere Valley Bank. (Emphasis added.)

(CP 272-274)

There was never anything subjective about Terry Brender's motives or intent. Mr. Brender told Cashmere Valley Bank in 1993 that he needed a loan so that he could settle his divorce. Cashmere Valley Bank was always aware of the purpose of the loan.

Cashmere Valley Bank's argument that Terry Brender had to borrow money from Cashmere Valley Bank in 1993 to pay off pre-1993 business loans is disingenuous and not supported by the facts. Mr. Brender has stated the following:

Jim Geary first learned of the lawsuit when I responded to CVB's request for production of documents in this case.

Consequently, because Jim Geary had no idea that CVB had sent a complaint to my then attorney, John Hotchkiss, I did not agree to consolidate my business loans in response to that complaint. I approached CVB for a loan to obtain funds to settle my divorce. It was CVB's purpose to refinance the business loans so they could obtain a secured position. Their purpose for the loan to achieve that is also evidenced by the attached loan documentation.

I could just have easily not refinanced the business loans and could have

made payment on those business loans without the consolidation. In other words, I did not need to consolidate the business loans to achieve better financing with more favorable payment terms. (Emphasis added.)

(CP 61-65)

In fact, Jim Geary testified that he was not aware of any lawsuit against Terry Brender when he made the 1993 loan to Mr.

Brender. Mr. Geary, when deposed, stated the following:

Q So in early 1993 he had \$203,000 unsecured with Cashmere Valley Bank and he's coming to you to talk about trying to settle a divorce?

A Yes.

Q And how much money did you and he talk about that he would have to borrow to settle his divorce

A I believe it was about - - the amount he requested from us was \$150,000.

(CP 397-398)

Q In fact, didn't the bank actually start a lawsuit against Mr. Brender and Mrs. Brender suing on the \$203,000?

A Gosh, no. I - -

Q You're not aware of that?

A No.

Q Not aware that Cashmere Valley Bank hired Terry McCauley to file a lawsuit against Mr.

and Mrs. Brender for the \$203,000 note, while at the same time working out this \$353,000 loan with Mr. Brender?

A No.

Q Okay. Since you were the loan officer on that \$203,000, I would assume you'd be the guy that would be sending it out to get collected - -

Mr. Walker: Are you going to ask a question?

Q - - would that be correct?

A Yes, I would be involved in that.

(CP 407-408)

Finally, there is no mention of any lawsuit against Terry Brender or Mr. Brender's need to pay off the pre-1993 business loans in Cashmere Valley Bank's documentation regarding the 1993 loan.

It is clear that Mr. Brender's pre-1993 business loans had nothing to do with the purpose of the 1993 loan. Again, the only reason Terry Brender wanted to borrow money from Cashmere Valley Bank in 1993 was so that he could settle his divorce.

Cashmere Valley Bank's reliance on Stillman v. First National Bank of North Idaho, 791 P.2d 23 (1990), is misplaced.

First, Stillman is not the law in the State of Washington. Conrad v. Smith, 42 Wash. App. 559, 712 P.2d 866 (1986), is the law in the State of Washington. Second, Stillman involved a determination of the status of a “single loan.” Stillman at 644. In this case, the only reason Terry Brender was borrowing money from Cashmere Valley Bank in 1993 was to settle his divorce and all of the money that he received from Cashmere Valley Bank was used for this personal purpose. Mr. Brender was not borrowing money for both exempt and nonexempt purposes. Cashmere Valley Bank’s restructuring of Mr. Brender’s pre-1993 business loans may have facilitated the obtaining of the loan but was not the purpose for which it was obtained. See First Nat’l Bank v. Skidis, 82 Ill. App. 3d 601, 38 Ill. Dec. 41, 403 NE.2d 56 (1980), also cited in Conrad.

The facts in this case clearly establish that Terry Brender went to Cashmere Valley Bank for a personal loan and the parties agreed to consolidate the amount borrowed with a preexisting loan. This is similar to what happened in Conrad. In that case, Mr. Conrad attempted to borrow money to pay off a business loan. The amount loaned had to be increased to pay off unpaid real estate taxes, a judgment lien, an IRS lien, and a Washington State Tax Warrant. Mr. Brender submits that just as the additional sums

borrowed did not change the purpose of the loan in Conrad, consolidation with a preexisting loan did not change the purpose of the loan in this case.

In Anderson v. Foothill Industrial Bank, 674 P.2d 232 (Colorado 1984), the Andersons borrowed \$27,500 from Foothill Industrial Bank. The proceeds of this loan were used to satisfy a previous second mortgage on the Anderson's residence of \$14,882.26 and the balance was used by the Andersons to go into a mail route business. The fact that more than one half of the loan was personal in nature did not preclude the court from finding that the loan was not a consumer loan.

Considering the evidence in this case in accordance with the foregoing, we find that it established the loan to be a commercial loan and not a consumer loan as a matter of fact. Appellant Glen Anderson inquired of three lenders in an attempt to secure the money for his mail route business. He told the loan officer at Person-to-Person that the money was to be used to "buy a mail route." At First Wyoming Bank, he said that it was to be used to operate a truck or otherwise engage in the mail route. He told the representative of appellee Foothill Industrial Bank that it was for a down payment on a truck and for start-up expenses. He did not require a loan until he decided to go into the mail route business. The debt was not "incurred

primarily for a personal, family, household * * * purpose" as required by § 40-14-604, W.S. 1977, supra. Although part of the proceeds of the loan were used to pay off that due on a second mortgage on appellants' residence, the testimony was that prudent lending practice would require such pay off with transfer of the collateral if the loan were made for the purpose of financing another enterprise. The thrust of all of the evidence was that the debt was "incurred *primarily*" for the purpose of entering a mail route business and not for a personal, family or household purpose. It was not a consumer loan. (Emphasis added.)

674 P.2d at 235-236.

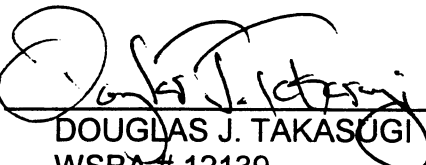
Finally, in determining whether the Federal Truth in Lending Act is applicable to a transaction, it must be liberally construed in favor of the consumer and the court should err on the side of the obligor in determining whether a transaction is for business or consumer credit. West Bank v. Maurer, 658 NE.2d 1381, 1387 (Ill. Appeal 1995).

II. CONCLUSION

In 1993, Terry Brender got a personal loan from Cashmere Valley Bank so that he could settle his divorce. The Federal Truth in Lending Act should apply to Mr. Brender's loan. Mr. Brender should have been granted summary judgment on this issue.

RESPECTFULLY SUBMITTED this 16th day of June, 2004.

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